

**IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA**

(CORAM: NDIKA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 181 OF 2020

MOROGA MWITA MOROGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from Ruling of the High Court of Tanzania at Musoma)

(Kisanya, J.)

dated the 25th day of February, 2020

in

Misc. Criminal Application No. 26 of 2019

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JUDGMENT OF THE COURT

7th & 14th June, 2022

KOROSSO, J.A.:

The Appeal before us filed by Moroga Mwita Moroga, the appellant is against the Ruling of the High Court dismissing his application that sought an extension of time to file an appeal out of time for failure to show sufficient cause for the delay in filing the appeal within time.

The background giving rise to the instant appeal is that Moroga Mwita Moroga, the appellant together with one Chacha Ghati @ Mtende (not a party in this appeal) were charged in the District Court of Serengeti at Mugumu with three counts. In the first count of Unlawful Entering in

the National Park Contrary to sections 21(1)(a) and 29 of the National Park Act, Cap 282 R. E. 2002 (the NPA), it was alleged that the appellant and Chacha Ghati @ Mtende on 15/10/2017 at about 21.00 hours at Bush Top area within Serengeti National Park in Serengeti District, Mara Region did unlawfully enter into Serengeti National Park without permission from the Director thereof previously sought and obtained. The second count was of Unlawful Possession of Weapons in the National Park, contrary to section 24(1)(b) of the NPA, the particulars being the parties named in the first count jointly and together on the same date and time, and area as in the first count were found in unlawful possession of weapons, to wit, one panga without a permit and failed to satisfy an authorized officer that the same was intended to be used for the purpose other than hunting, killing, wounding or capturing of an animal.

The third count was Unlawful Possession of Government Trophy contrary to section 86(1) and 2(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with Paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 (the EOCCA). It was alleged that the parties in the first and second counts above are jointly and together on the same date, time and area as in the above counts, were found in unlawful possession

of 5 pieces of dried wildebeest meat valued at Tshs. 1,417,000/- the property of the Tanzania Government.

A trial proceeded and the prosecution paraded two witnesses to prove their case, Juma Kunani (PW1) and Wilbroad Vicent (PW2). On the part of the defence, one of the accused absconded having jumped bail and the appellant refused to testify. Upon hearing the evidence adduced for prosecution and the defence, the trial court convicted the appellant and his colleague in absentia and in the first and second counts sentenced each of them to one (1) year imprisonment, and in the third count, they were sentenced to twenty (20) years imprisonment.

The appellant was aggrieved with the decision but failed to institute the appeal on time. On 4/12/2018, he filed a notice of appeal and thereafter lodged an appeal which was struck out finding the petition of appeal defective. On 14/11/2019, the appellant instituted Miscellaneous Application No. 26 of 2019 in the High Court, Musoma Registry seeking leave to appeal out of time. Both parties were called for a hearing before Kisanya, J. on 18/2/2020 who dismissed the application finding that the applicant failed to explain the reasons for the delay to file an appeal on time.

The appellant had filed a memorandum of appeal with three grounds of appeal which upon dialogue with the Court, was compressed into one ground of appeal that is;

"That the learned High Court Judge erred in law and fact in finding that the appellant failed to show good cause for the delay to file his appeal on time."

When the application came for hearing in this Court on 7/6/2022, the applicant appeared in person, unrepresented, while the respondent Republic was represented by Mr. Tawabu Yahya Issa and Mr. Nico Malekela, learned State Attorneys.

The appellant preferred for the learned State Attorney to be the one to submit first and he rejoin later. He implored the Court to find that the High Court's dismissal of his application for leave to appeal out of time was erroneous having failed to take into consideration that he had advanced sufficient cause for the delay to file his appeal against the impugned trial court's decision within time and grant him leave to file his appeal out of time.

Mr. Issa prefaced by resisting the appeal, expressing his support for the High Court dismissal of the appellant's application for an extension of time to file appeal against the impugned decision of the trial court out of time. He argued that the appellant failed to expound a good cause for the

delay to file an appeal between 21/9/2019 to 14/11/2019. He contended that having revisited the reasons advanced by the High Court to dismiss the application, he had nothing to fault them because they were based on the law. He argued that the application by the appellant did not address matters to consider in such an application, but discussed the merits of the intended appeal. He cited the decision considered by the High Court, that is, **Agumbwike Kawambe Vs Republic**, Criminal Appeal No. 10 of 2015 (unreported), which stated that even a delay of one day should lead to the denial to grant such an application.

The learned State Attorney stated further that although a court should be more lenient when an applicant is imprisoned taking into consideration their limitation in processing appeals relying on the prison officers, moreover, in this case, there were no reasons for delay submitted before the High Court for consideration or to show how the appellant was hindered by prison authorities in pursuit of his appeal. He argued that in the appellant's affidavit, what was averred was the fact that his appeal was struck out for being defective and did not say what transpired thereafter to pursue his appeal until the current appeal was filed, sixty days later. There was no exercise of diligence to pursue his appeal by the appellant, he argued. He thus prayed for the appeal to be dismissed.

In his rejoinder, the appellant reiterated the contention that the delay was not of his own volition but caused by the prison officers who are the ones to undertake most of the documentation related to appeals. He argued that the delay to file on time is caused by prison officers and urged us to grant him the prayer sought.

Having heard the submissions from the appellant and the learned State Attorney, clearly, the thrust of contention for our determination is whether the appellant expounded sufficient cause to extend the time to appeal to the High Court to warrant the grant of the prayer sought.

The position is well settled that in an application for an extension of time to do any act in the High Court, the applicant must assign good cause. This is explicit in the provision that was used to move the Court in the Chamber summons filed by the appellant, that is, section 361(2) of the Criminal Procedure Act, Cap 20 R.E. 2002, now 2019 (the CPA) that reads;

"S. 361 (2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."

The Court in the case of **Hamisi Mahona Vs Republic**, Criminal Appeal No. 141 of 2017 (unreported) had an opportunity to discuss the thrust of section 361(2) of the CPA and stated:

"The catch phrase in that section is 'the High Court may, for good cause, admit an appeal'. That means, for the court to determine whether it should grant extension of time to file appeal or not, the sole determinant factor is whether or not the applicant has established good cause explaining the delay."

The provision was also construed by this Court in another case **Hamis Ismail @ Zulu Vs Republic**, Criminal Appeal No. 205 of 2014 (unreported), and the Court held;

"under the above section, the underlying factors for consideration in an application for extension of time is good cause for the delay. What the High Court had to consider in determining the application was whether the affidavit filed by the appellant to support his application gave good cause for the delay."

Taking the above position into the fold, our task is to determine whether the High Court judge applied the positions stated in the above excerpts when rejecting the application. We find that, the High Court judge properly guided himself when at page 52 he stated:

"It is settled that, in an application for extension of time, the applicant is duty-bound to demonstrate good or sufficient cause for delay. Further, every delay, even if for one day has to be accounted for."

He then proceeded to apply the said principle in the context of the application before him by revisiting what is averred in paragraph 4 of the affidavit supporting the chamber summons. The High Court judge found that in the said paragraph there was no mention of the date on which the appeal was struck out, which in essence was on 20/9/2019 as found from the record. The High Court then reasoned that even if the date of the appellant's appeal was struck out was not shown the date was 20/9/2019 and the application before him was filed on 14/11/2019, almost 54 days from the date his appeal was struck out. Undoubtedly, beyond the time for filing an appeal against the decision of the trial court. The High Court was thus of the view that the appellant failed to account for the delay from 21/09/2019 to 14/11/2019.

The High Court judge proceeded to consider the second ground for delay averred by the appellant which contended that his rights were seriously prejudiced by the trial court and that the appeal had an overwhelming chance of success. The High Court judge was of the view that in failing to state the alleged violated rights, it will be difficult to delve into the complaint and that he was not in the position to decide the prospects of the appeal at the stage of the application for extension of time and thus refused to grant an extension of time to appeal.

Having perused through the affidavit supporting the application we have to agree with the High Court judge and the learned State Attorney that it contains nothing to explain the delay to file an appeal on time. Since the 1st, 2nd and 3rd paragraphs of the affidavit only allude to the appellant's name and position, the offence charged, convicted, how he was convicted and the sentence imposed, we reproduce from paragraphs 3-6 which read as follows:

'4. That, following the above sentence I was not satisfied with the decision of the trial magistrate and therefore I appealed to this honorable court after receiving the copy of the judgment and proceeding but unfortunately appeal was struck out for the reason of petition being defective.

5. That, I intend to file afresh appeal but from the date the judgment delivered will be out of time limit thus why I pray this honourable High court to grant me permission to extend time for me to appeal out of time.

6. That, the right of the applicant in the said case was seriously prejudiced by the trial court, and he has overwhelming chance of success in appeal."

According to what he averred in his affidavit, although the appellant refers to his appeal to the High Court to challenge the decision of the trial

court being struck out, he does not provide the date this was done. It is only through the High Court proceedings that we gather that his appeal was struck out for being defective on 21/09/2019. We also gather that the application to the High Court for extension of time was lodged on 14/11/2019 which amounts to around 52 days that needed and explanation.

Clearly, the affidavit does not address the issue of delay. We thus cannot fault the High Court for finding the same. Additionally, on the issue raised in paragraph 6, alleging infringement of his rights, which are not expanded, it is also not an issue as it is, which can be gauged to be a good cause for the delay to file an appeal within time. Section 361(2) of CPA grants jurisdiction to the High Court to grant application for extension of time where good cause is expounded heedless of the competence of the intended appeal. Determination of whether the appeal has an overwhelming chance of success is not one of the matters for the court determining the application to decide at that stage. We are thus in tandem with the High Court judge that this was not in the domain of the High Court at that stage of determination of the application for extension of time for file appeal out of time.

For the foregoing, we find the appeal devoid of merit hence it is hereby dismissed.

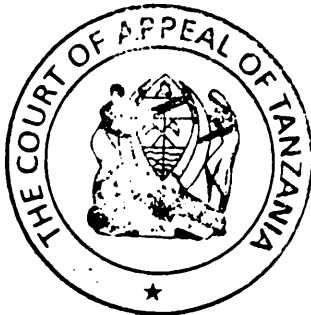
DATED at **MUSOMA** this 13th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2022 in the presence of the Appellant in person and Mr. Isihaka Ibrahim, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. Magesa
C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL